GOLDEN HOPE PLANTATIONS (PENINSULAR) SDN BHD

v.

SARASWATHY KATHAN

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL APPEAL NO: 16-3-2000]
1 FEBRUARY 2002

LABOUR LAW: *Employment - Claim for paid annual leave - Employee under temporary disablement - Employees' Social Security Act 1969, s. 53 - Whether employee in continuous service - Whether entitled to claim paid annual leave*

The respondent worked for the appellant company as a rubber tapper. She had met with an accident and was certified unfit to work for the whole of 1999. Under the Employees' Social Security Act 1969 ('the ESSA'), she was accordingly paid temporary disablement benefits for that year but did not receive any payment *in lieu* of her paid annual leave for 16 days in 1999. The non-payment issue was taken to the Labour Department and subsequently, the appellant was ordered to pay the respondent RM250.08. This was an appeal against the said decision.

Held:

[1] The respondent was entitled to her paid annual leave as she was in continuous service, as mandated by s. 60E(1) of the Employment Act 1955. The respondent was not away from work without a lawful excuse in that she was under temporary disablement within the meaning of the ESSA. Additionally, s. 53 of the ESSA provides that an employee generally cannot be dismissed or discharged during the period of temporary disablement. (pp 637 g-h & 638 a)

[Appeal dismissed with costs.]

Case(s) referred to:

Kesatuan Kebangsaaan Pekerja-pekerja Perusahaan dan Kimia v. Castrol (M) Sdn Bhd [1997] 2 MLJ 854 HC ***(refd)***

Legislation referred to:

Employment Act 1955, ss. 7, 7A, 7B, 59(1), 60D(1B), 60E, 60E(1), (1B), (2), 69(1), 77

Employees Social Security Act 1969, ss. 44, 53

Other source(s) referred to:

Halsbury's Laws of Malaysia, vol 7, para 120.002

For the appellant - A Ramadass; M/s Ramadass & Assoc
For the respondent - R Kesavan; M/s Md Tajuddin & Co

Reported by M Maheswaran

JUDGMENT

Jefrrey Tan J:
This is the employer's appeal, lodged pursuant to s. 77 of the Employment Act 1955 (Act), against the order of the Pejabat Buruh Segamat; on 15 March 2000, the Pejabat Buruh Segamat ordered the appellant to pay RM250.08 to the respondent as payment *in lieu* of 16 days annual leave for 1999, the year the respondent was under temporary disablement.

According to the facts presented by counsel in their written submissions, the respondent (a rubber tapper) met with an accident during the course of employment and was certified unfit for work for the whole of 1999, for which year the respondent received temporary disablement benefits under the Employees' Social Security Act 1969. The respondent did not receive any payment *in lieu* of her paid annual leave for 1999 that she had not taken.

Mr. Ramadass for the appellant began by saying that the issue is whether the respondent was entitled to be paid annual leave for the year 1999. And in the course of their oral submissions, both learned counsel reached agreement that the only issue for determination by this court is "whether the respondent was entitled to be paid annual leave of 16 days for 1999 when she was receiving temporary disablement benefit for the whole of 1999".

Mr. Kesavan for the respondent submitted that s. 59(1) of the Act does not exclude the entitlement of annual leave during the period of temporary disablement, although the same section excludes the entitlement of a rest day in each week during the period in which the employee is on maternity leave or on sick leave or during the period of temporary disablement under the Workmen's Compensation Act 1952 or under the Employees' Social Security Act 1969. The respondent was on sick leave, and s. 60E(1B) of the Act applied. Article 20(b) of the collective agreement, which was a more favourable term or condition of service than the provision in s. 60E(2) of the Act, prevailed over s. 60E(2) of the Act. It was an agreed fact that it was the practice that annual leave payment would be made after each year of service. Therefore, after a year's absence due to disablement, the respondent was entitled to receive 16 days payment *in lieu* of annual leave. The appellant could not contend that to be entitled to payment *in lieu* of annual leave, the respondent must agree in writing not to avail herself of any of her annual leave entitlement. The

respondent was still an employee in 1999. The respondent who was under temporary disablement was paid benefits under s. 22 of the Employees' Social Security Act 1969. The respondent was not on leave without pay, within the meaning of s. 60E(3B) of the Act. Payment *in lieu* of public holidays was paid to the respondent for 1999. If it was true that the respondent was not entitled to annual leave for 1999 because she did not work for that year, then the respondent should not also be given payment *in lieu* of public holidays for 1999.

Mr. Ramadass submitted that the respondent was paid wages for 12 public holidays because of s. 60D(1B) of the Act which provides that an employee who under temporary disablement is entitled to all public holidays. Section 60D(1B) deals with public holidays and not annual leave. The Labour Court could not make use of s. 60D(1B) to order payment *in lieu* of annual leave. There is no provision in the Act concerning annual leave during disablement. In 1999, the respondent was lawfully away from work, and was entitled to the benefits under the Act. Annual leave is provided by s. 60E of the Act. But during the period of her disablement, the respondent was not able to take her annual leave. Annual leave pay is wages. The receipt of benefits under the Employees' Social Security Act 1969 barred the respondent from a claim for annual leave. A complaint under s. 69(1) of the Act is only in respect of wages or any other cash payments due to the employee. Since the complaint was made under s. 69(1) of the Act, then it was wages that was claimed. The order was "bayaran cuti tahunan", which shows that it was wages. Section 44 of the Employees Social Security Act 1969 applied, and annual leave for 1999 could not be claimed.

Mr. Kesavan replied that payment *in lieu* of annual leave is not wages just because the complaint was made under s. 69(1) of the Act. Section 69(1) of the Act covers all monetary claims, including a claim for retrenchment benefits. Article 20 of the collective agreement provided for payment *in lieu* of annual leave. The respondent's entitlement to annual leave was because of s. 60E(1) of the Act. If she was employed, then she was entitled to annual leave. It was conceded that the respondent was employed throughout 1999. Therefore she was entitled to 16 days annual leave. Section 60E(2) of the Act could not apply as art. 20 of the collective agreement was more favourable to the employee. In the collective agreement, the employee could avail him of the right to receive payment *in lieu* of annual leave. But under s. 60E(2), that right is dependent upon the employer.

The short reply from Mr. Ramadass was that art. 20 only applies to an employee who elects not to avail himself of any of his annual leave entitlement.

As for the written submissions, in the main consisting of arguments attacking and or supporting the individual findings and grounds of decision of the Pejabat Buruh Segamat, they are now to a large extent academic if not abandoned, in view of the agreed issue which both parties agree would settle this appeal.

In order to answer the agreed issue, it is necessary to examine the legal provisions concerning annual leave. Paid annual leave is first of all an employment benefit mandated by law. Section 60E(1) of the Act provides, "An employee shall be entitled to paid annual leave ..." for every twelve months of continuous service with the same employer. Section 60E(1A) of the Act provides, "The paid annual leave ... shall be in addition to rest days and paid holidays". Section 60E(1B) of the Act further provides, "Where an employee is on paid annual leave becomes entitled to sick leave or maternity leave while on such annual leave, the employee shall be granted the sick leave or the maternity leave ... and the annual leave shall be deemed to have not been taken in respect of the days for which sick leave or maternity leave is so granted". Section 60E(2) provides, "The employer shall grant and the employee shall take such leave not later than twelve months after the end of every twelve months continuous service and any employee who fails to take such leave at the end of such period shall thereupon cease to be entitled thereto: Provided that an employee shall be entitled to payment *in lieu* of such annual leave if, at the request of his employer, he agrees in writing not to avail himself of any or all of his annual leave entitlement". And no term or condition of a contract of service or of an agreement can be less favourable to an employee than the term or condition of service prescribed by the Act, for such a term or condition shall be void and of no effect to that extent and shall be substituted therefor by the more favourable term or condition of service prescribed by the Act (see s. 7 of the Act; see also *Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Petroleum dan Kimia v. Castrol (M) Sdn Bhd* [1997] 2 MLJ 854). Nevertheless, an employer and an employee may agree to a term or condition of service which is more favourable to the employee than the provisions of the Act or any regulations, order, or other subsidiary legislation whatsoever made thereunder (see s. 7A of the Act) or may agree to a matter not covered by the Act to be provided for in a contract of service (see s. 7B of the Act) (see also *Halsbury's Laws of Malaysia,* vol 7 para 120.002).

In so far as the annual leave of the respondent is concerned, art. 20 of the collective agreement between the Malayan Agricultural Producers Association and the National Union of Plantation Workers provides as follows:

Article 20 – Annual Leave

(a) Subject to the provision of the Employment Act 1955, all employees shall be entitled to paid annual leave of:

(i) 14 days per annum if the employee has been employed for a period of less than 5 years; and

(ii) 16 days per annum if the employee has been employed for a period of 5 years or more.

(b) An employee shall be entitled to payment *in lieu* of such annual if, at the request of the employer or voluntarily, he agrees not to avail himself of any or all of annual leave entitlement.

Suffice it to say that art. 20 is clearly more favourable to the employee than the provisions of ss. 60E(1) and 60E(2) of the Act: whereas the Act stipulates that an employee shall be entitled to paid annual leave of eight days for every 12 months of continuous service if he has been employed for a period of less than two years and to paid annual leave of 12 days for every 12 months of continuous service if he has been employed for a period of two years or more but less than 5 years, art. 20 provides that an employee shall be entitled to paid annual leave of 14 days if he has been employed for a period of less than five years; and whereas the Act stipulates that an employee shall be entitled to payment *in lieu* of such annual leave if, at the request of the employer, he agrees not to avail himself of any or all of his annual leave entitlement, art. 20 provides that "an employee shall be entitled to payment *in lieu* of such annual if, at the request of the employer or voluntarily, he agrees not to avail himself of any or all of annual leave entitlement". In other words, under art. 20, an employee has the right to elect to receive payment *in lieu* of annual leave, a right not given to him under the Act. And unlike the Act, art. 20 does not say that an employee who agrees not to avail himself of any or all of his annual leave entitlement must do so in writing.

But the Act is silent on the annual leave of an employee under temporary disablement. Section 59(1) of the Act provides that an employee shall not be entitled to the rest day during the period in which the employee is on maternity leave or on sick leave, or during the period of temporary disablement under the Workmen's Compensation Act 1952 or under the Employees' Social Security Act 1969: that takes away the rest day in a week of the employee during the period of temporary disablement. Section 60D(1B) of the Act provides, "Where any of the holidays or any other day substituted thereof ... falls within the period during which the employee is on sick leave or annual leave ... or falls within the period of temporary disablement under the Workmen's Compensation

Act 1952 or under the Employees Social Security Act 1969, the employer shall grant another day as a paid holiday in substitution for such public holiday or the day substituted thereof": that restores the holiday that falls during the period of temporary disablement back to the employee. Section 60E(1B) provides, "Where an employee is on paid annual leave becomes entitled to sick leave or maternity leave while on such annual leave, the employee shall be granted the sick leave or the maternity leave ... and the annual leave shall be deemed to have not been taken in respect of the days for which sick leave or maternity leave is so granted": that restore the annual leave in respect of the days for which sick leave or maternity leave is granted. Section 60E(3B) provides, "Where an employee is granted leave of absence without pay by his employer during any period of twelve months and the period of absence exceeds in the aggregate 30 days, that period of leave of absence shall be disregarded for the purpose of computing his length of service with the employer under this section": that would mean that that period of absence without pay shall be disregarded for the purpose of computing the length of service with regard to the duration of the annual leave.

Still, the Act does not say that an employee shall not be entitled to annual leave during the period of temporary disablement under the Workmen's Compensation Act 1952 or under the Employees Social Security Act 1969. The only provisions in the Act touching on temporary disablement are s. 59(1) which says that an employee shall not be entitled to the rest day during the period of temporary disablement, and s. 60D(1B) which says that the holiday that falls during the period of temporary disablement shall be restored to the employee. The only provision in the Act touching on the ineligibility of paid annual leave is the 2nd proviso to s. 60E(1) which provides, "... where an employee absents himself from work without the permission of his employer and without reasonable excuse for more than ten per centum of the working days during the twelve months of continuous service in respect of which his entitlement to such leave accrues he shall not be entitled to such leave". None of the aforesaid provisions apply in the instant case.

On the other hand, s. 60E(1) mandates that the respondent shall be entitled to paid annual leave for every twelve months of continuous service. The respondent would only not be so entitled if she was not in continuous service. But could it be said that during the period of temporary disablement the respondent was not in continuous service? For a start, the respondent was not away from work without lawful excuse. Furthermore, it is not in dispute that the respondent was under temporary disablement within the meaning of the Employees Social Security Act 1969. And s. 53 of the Employees Social Security Act 1969 provides, "No employer shall, except as provided under the regulations, dismiss,

discharge, or reduce or otherwise punish an employee during the period he is in receipt of disablement benefit for temporary disablement". Since the respondent could not have been dismissed or discharged during the period of temporary disablement, then there could not have been a break in service by reason of temporary disablement. It must pan out that the respondent was still in continuous service during the period of temporary disablement. And in continuous service, the respondent was entitled to paid annual leave for 1999.

It was argued that s. 44 of the Employees' Social Security Act 1969 bars any claim from the respondent for paid annual leave. With respect, s. 44 says nothing of that sort. Section 44 merely says, "No person shall be entitled to disablement benefit for temporary disablement in respect of any day on which he works and receives wages". And with respect, the claim by the respondent was not for disablement benefits under Part III of the Employees' Social Security Act 1969. The claim by the respondent was not for wages, as was contended. The claim by the respondent was for payment *in lieu* of paid annual leave, plain and simple. And under art. 20, the respondent was entitled to elect to receive payment *in lieu* of her annual leave for 1999, without being so requested by the appellant to elect so.

For the above reasons, the agreed issue is answered in favour of the respondent. Consequently, this appeal is dismissed with costs.